

THE AUSTRALIAN RETAILERS ASSOCIATION



A U S T R A L I A N
R E T A I L E R S
A S S O C I A T I O N

NATIONAL EMPLOYMENT STANDARDS

EXPOSURE DRAFT

SUBMISSION TO

DEPARTMENT OF EDUCATION, EMPLOYMENT
AND WORKPLACE RELATIONS

CONFIDENTIAL

4 APRIL 2008

Submission by:

Australian Retailers Association

Level 2, 104 Franklin Street

MELBOURNE VIC 3000

Tel: 03 9321 5000

Fax: 03 9321 5001

ara@ara.com.au

CONTACTS

Richard Evans

Executive Director

richard.evans@ara.com.au

Phil Barresi

National Director, Employment Relations

phil.barresi@ara.com.au

Toby Halls

Employee Relations Specialist/Melbourne Team Leader

toby.halls@ara.com.au

THE AUSTRALIAN RETAILERS ASSOCIATION – THE VOICE OF THE RETAIL INDUSTRY

The Australian Retailers' Association (ARA) is the peak national retail association representing the interests of the largest employing industry in Australia.

We provide leadership and solutions to improve the long-term viability, productivity and visibility of the retail industry by proactively dealing with government, media and other regulatory bodies on behalf of our members.

The retail industry as at December 2007¹ contributed 5.78% of Australia's Gross Domestic Product (GDP) and is the largest employer in Australia, providing 15.07% of all jobs.

ARA members comprise a diversity of sizes and types of retailers reflecting the profile of the retail industry, ranging from large national chain retailers to one-person operators throughout the nation.

The ARA provides a range of comprehensive services, advice and representation suited to both small and large retailers in the areas of employment relations, occupational health and safety, tenancy, consumer law and retail business solutions. This includes a range of retail specific training that supports best practice in retail.

¹ ABS Australian National Accounts: National Income, Expenditure and Product 5206.0 December 2007

OVERVIEW OF THE RETAIL INDUSTRY

Retail Labour Employment

The retail industry itself employs more than any other industry and accounts for 15.07% of the Australian workforce².

AUSTRALIAN LABOUR MARKET³

INDUSTRY	PERCENTAGE OF LABOUR MARKET
Agriculture, forestry and mining	3.4%
Mining	1.3%
Manufacturing	10.3%
Electricity, gas and water supply	0.8%
Construction	9.1%
Wholesale trade	4.2%
Retail Trade	15.1%
Accommodation, cafes and restaurants	4.7%
Transport and storage	4.7%
Communication services	1.8%
Finance and insurance	3.7%
Property and business services	11.6%
Government administration and defence	4.6%
Education	7.3%
Health and community services	10.5%
Cultural and recreational activities	2.8%
Personal and other services	4.0%

*rounded to the nearest one decimal place

² Calculated using ABS Australian Labour Market Statistics 6105.0 January 2008

³ Calculated using ABS Australian Labour Market Statistics 6105.0 January 2008

TABLE OF CONTENTS

Executive summary.....	6
1. Introduction.....	9
2. Maximum weekly hours.....	11
3. Parental leave (and related entitlements).....	17
4. Annual leave.....	20
5. Personal / carer's leave and compassionate leave.....	23

EXECUTIVE SUMMARY

OUR 2008 POSITION

1. The ARA has considered the National Employment Standards Exposure Draft and its implications on retailers – both large and small. Overall the introduction of a NES will bring greater certainty and consistency in basic employment standards.
2. The ARA's preference is a workplace environment that encourages consistency and certainty in the workplace balanced against the need for workplace flexibility in order to respond to demands of a competitive marketplace.
3. The marketplace increasingly demands that retailers provide a seven day a week service with extended daily hours of operation. Coupled with seasonal influences this places pressure to establish a work hours regime which provides both certainty to the employee and guaranteed labour supply to the employer.
4. The ARA as a respondent to the ACCI submission and is supportive of the recommendations contained within their submission.
5. ARA has decided to compliment the ACCI submission with a specific submission highlighting those aspects of the NES which directly impact on the retail sector and its operations as outlined in Paragraphs 2 and 3.
6. The ARA submission will be sector specific in its recommendations:
 - Maximum weekly hours
 - Parental leave (and related entitlements)
 - Annual leave
 - Personal / carer's leave and compassionate leave

7. ARA Recommendations:

Recommendations

1. Minimum Wage

- a) Minimum wage provisions be included in the NES to ensure coverage for traditionally award-free employees
- b) Minimum wage be adjusted by appropriate body such as FWA if or when justified subject to appropriate economic, social and other relevant factors
- c) Rates and conditions of modern awards not to be extended to traditionally award-free employees

2. Averaging of Hours

- a) The NES should provide for a “catch-all” ability to average hours of work over a period not exceeding 12 months consistent with the Standard
- b) The NES should at least include a right to average hours of work for traditionally award-free employees in a manner akin to (a) above.
- c) If neither (a) nor (b) above are acceptable, traditionally award-free employers must have averaging hours rights on terms no less favourable than those subject to current Awards.
- d) The draft NES provisions relating to additional hours considerations should be amended to focus on ‘... *the employee’s health and safety* ...’ and should not consider the hours normally worked by employees.

3. Parental Leave (and Related Entitlements)

- a) Additional concurrent leave beyond the current one week standard should be able to be refused by employers subject to any refusal being based strictly on reasonable business grounds
- b) Examples of reasonable business grounds should not form part of the proposed NES. These issues should be considered based on

the particular circumstances of any given case.

- c) Any paid entitlement to parental leave including “paid no safe job leave” should not be finalised before findings of the Productivity Commission on the issue of paid leave are made known.

4. Annual Leave

- a) A definition of ‘shift worker’ be included in the NES for the purpose of additional annual leave. However, this definition be confined only to award-free employees and not those covered by modern awards.
- b) Base rate of pay definition should only be built upon in modern awards to include annual leave loading or relevant shift allowance where appropriate based on particular industries.
- c) NES must allow for employers to give employees notice to take leave and should be notice appropriate to the circumstances. This would be consistent with the current standard and current awards take too varied approach on the issue.

5. Personal Carer’s Leave and Compassionate Leave

- a) Personal leave notification obligation for employees should reflect ‘... *(which may be before or after the leave starts)*...’ consistent with the current standard to avoid being construed to invite late notification of absences.
- b) Some additional clarity should be afforded as to when employees are required to afford evidence substantiating absences from work
- c) The re-crediting of annual leave during personal/carer’s leave absences should only be permitted by agreement with the employer or not permitted at all.

1. INTRODUCTION

No minimum wage

1. The Discussion Paper suggests that all employees will have the benefit of a minimum wage notwithstanding that this will be a matter governed only by modern awards⁴.

Implications for award-free employers

- 1.1 The ARA submits that many employees are in fact not covered by awards or registered workplace agreements and to have wages prescribed only by such instruments is insufficient and that the omission of such a provision in the NES has potentially far-reaching consequences.
- 1.2 In support of this contention the ARA notes that State Wage case decisions, as evidenced by the current consideration by the NSW Industrial Relations Commission, continue to be held in order to have coverage over those employees not affected by federal minimum wage decisions of the AFPC or subsequently of Fair Work Australia.
- 1.3 Past federal minimum wage case determinations have generally been accepted and flowed through to award-free employers.
- 1.4 The inclusion of a minimum wage in the NES would obviate the need for separate jurisdictional decisions by State-based Industrial Relations Commissions and be one further step to creating certainty rather than confusion amongst employers and employees.

⁴ DEERW (2008) National Employment Standards Exposure Draft – Discussion Paper, Para 7, p.1

- 1.5 The inclusion of a minimum wage would also be further evidence of a move towards a truly national workplace relations regime.
2. In its submission to the Australian Fair Pay Commission on 14 March 2008, the ARA strongly recommended that the AFPC adjust only the Federal Minimum Wage or to make use of its power to record a differential decision and award a different increase to employees in the Retail Trade Industry Sector when compared to other industries⁵.
 3. The absence of a minimum wage provision in the NES would effectively prevent Fair Work Australia from accepting a recommendation consistent with that advocated in Paragraph 2 above even if justified upon consideration of appropriate economic, social and other relevant factors.
 4. The ARA is concerned that a possible consequence of omitting minimum wage provisions from the NES is that wages and other conditions contained in modern awards may be extended to traditionally award-free employees notwithstanding the intentions set out in the Award modernisation request⁶.
 5. This would confer a far greater entitlement to such employees who would otherwise be subject to the FMW as provided for under the current legislation and represent significant cost increases for employers in the retail sector.
 6. With the exception of the independent submissions made by the ARA above in relation to this matter, it is otherwise in general support of the positions advanced by ACCI.

⁵ ARA (2008) Submission to the AFPC, Para 53, p.15

⁶ Award modernisation request (2008), Para 2, p.1

Recommendations

- a) Minimum wage provisions be included in the NES to ensure coverage for traditionally award-free employees
- b) Minimum wage be adjusted by appropriate body such as FWA if or when justified subject to appropriate economic, social and other relevant factors
- c) Rates and conditions of modern awards not to be extended to traditionally award-free employees. These employees will be subjected to all the rights and protections conferred upon them by the NES.

2. MAXIMUM WEEKLY HOURS OF WORK

- 7. The Discussion Paper suggests that the averaging of hours of work is something that will be addressed solely within the confines of modern awards and will not form part of the NES itself⁷.

Why NES should provide for averaging of hours

- 8. The averaging of hours is a critical requirement of flexible employment arrangements in an industry sector increasingly reliant on seasonal and changing consumer behaviour to drive demand for its services and products.

⁷ DEERW (2008) National Employment Standards Exposure Draft – Discussion Paper, Para 49, p.7

9. The retail sector is one such industry which is furthermore compounded by a high mix of casualisation and part-time employment to compliment its full time employment arrangements.
10. The ARA is concerned that the NES does not provide for the flexibility of averaging of hours for several reasons.

Maximum flexibility for employers and employees

11. The preference of the ARA is to include as part of the NES, ability to average hours of work over a period not exceeding 12 months duration. This will allow for maximum rostering flexibility for both employers and employees in the retail trade sector – consistent with the Australian Fair Pay and Conditions Standard (“the Standard”)⁸.
12. There would be no need for the NES to prescribe additional detail so far as the arrangement of hours is concerned as this could be a matter left to negotiation between the parties via the terms of contracts of employment. Alternatively, it could be built on through the content of modern awards and workplace agreements.
13. The ARA acknowledges that the utilisation of a 12 month averaging cycle would normally be confined to employers whose business is seasonal in nature. It could also be said that the administrative burden of monitoring a work cycle of this duration would indicate its utilisation would generally be confined to those employers who genuinely rely upon it for their survival.

⁸ Part 7 of Workplace Relations Act 1996

Implications for award-free employers

14. If the “catch-all” preference of the ARA pursuant to Paragraph 11 above is not accepted, then it submits that there should be scope for the averaging of hours for award-free employees to form part of the NES in the same terms.
15. If the inclusion of a provision in NES for up to 12 month averaging cycles for award-free employees is not acceptable in any form, the ARA submits that the ability to average hours of work must still be addressed. It needs to be addressed in a manner no less favourable to employers than terms currently applicable to Award-based employees.

An example of this is set out below.

22. 38 HOUR WEEK

22.1 *Ordinary hours of work shall be an average of 38 per week as provided in clause 23 - Hours of work and rosters, and clause 25 - Night shift (full-time and part-time employees).*

22.2 *Except as provided in 22.5, the method of implementation of the 38 hour week may be any one of the following:*

22.2.1 *shorter days, that is 7.6 hours;*

22.2.2 *a shorter day or days each working week;*

22.2.3 *a shorter fortnight, i.e. four hours off in addition to the rostered day off;*

22.2.4 *a fixed day off in a four-week cycle;*

22.2.5 *a rotating day off in a four-week cycle;*

22.2.6 *an accumulating day off in a four week cycle, with a maximum of five days being accumulated in five cycles.*

22.2.7 *Provided that for all purposes of this award (other than 29.2.3) day or half day off which accrues under 22.2.3, 22.2.4 and 22.2.5 shall be deemed to be unpaid.*

22.3 *In each shop, an assessment shall be made as to which method of implementation best suits the business and the proposal shall be discussed with the employees concerned, the objective being to reach agreement on the method of implementation.*

22.4 *Circumstances may arise where different methods of implementation of a 38 hour week apply to various groups or sections of employees in the shop or establishment concerned.*

22.5 **Substitute days**

22.5.1 *An employer, with the agreement of the majority of employees concerned, may substitute the day or half day an employee is to take off in accordance with 22.2.3, 22.2.4 and 22.2.5, for another day or half day in the case of a breakdown in machinery or a failure or shortage of electric power or to meet the requirements of the business in the event of rush orders or some other emergency situation.*

22.5.2 *By agreement between an employer and an employee, another day may be substituted for the day that employee is to be rostered off.⁹*

⁹ SDAEA Victorian Shops Interim Award 2000

Reasonable additional hours

16. The draft NES provisions set out a number of factors for consideration to determine whether additional hours are reasonable or otherwise and whilst these are generally acceptable in light of current and previous standards, there is one area of concern.
17. The ARA submits the reference to '*...any risk to employee health and safety ...*' in Item 9(4)(a) of the draft NES provisions should reflect '*any risk to **the employee's** health and safety ...*' to maintain consistency with the current Standard and current award terms. All other considerations set out focus on '*the employee*'.
18. The ARA is unable to see the necessity for this change and believes that it may widen the scope for employees to unreasonably refuse to work additional hours for reasons that have nothing to do with their own individual safety.
19. To possibly allow employees to determine when the safety of other employees may be at risk in this context is inappropriate. This should continue to be the responsibility of the individual employer pursuant to relevant Occupational Health and Safety legislation.

Question 1 (page 8)

Should the maximum hours NES expressly provide that an employer will not be in breach of the NES where an employee works additional hours of their own volition?

- The answer is YES, consistent with the intention set out in paragraph 52 of the Discussion Paper.

Question 2 (page 9)

Should the proposed maximum hours NES address the issue of unreasonable additional hours by reference to the hours normally worked by an employee?

- The answer is NO. The potential benefits and drawbacks for both parties by including a reference to hours normally worked would suggest its relevance is best left considered on the particulars of any given case.

20. With the exception of the independent submissions made by the ARA above in relation to this matter, it is otherwise in general support of the positions advanced by ACCI.

Recommendations

- a) The NES should provide for a “catch-all” ability to average hours of work over a period not exceeding 12 months consistent with the Standard
- b) The NES should at least include a right to average hours of work for traditionally award-free employees in a manner akin to (a) above.
- c) If neither (a) nor (b) above are acceptable, traditionally award-free employers must have averaging hours rights on terms no less favourable than those subject to current Awards.
- d) The draft NES provisions relating to additional hours considerations should be amended to focus on ‘... the employee’s health and safety ...’ and should not consider the hours normally worked by employees.

3. PARENTAL LEAVE (AND RELATED ENTITLEMENTS)

Concurrent leave

- 21. The ARA is concerned that the increase in concurrent leave benefits proposed in the draft NES provisions may have a negative impact upon the operational requirements of small businesses. ARA members have previously communicated difficulties experienced with parental leave entitlements where the employee and spouse are in fact employed by the same employer.

22. The draft NES provisions (Item 15(5)) allows for three weeks leave to be taken concurrently between an employee and spouse from the time of confinement, or placement in the case of adoption. This represents an additional two week benefit on the one week entitlement available under the current Standard.
23. The ARA suggests that employers should be allowed to refuse additional concurrent leave beyond the current one week threshold strictly based on reasonable business grounds.

Refusal on reasonable business grounds

Questions 12 & 13 (page 21)

In what situations should examples of reasonable business grounds be included in the proposed parental leave NES?

- The answer is NONE. These issues should be considered based on the particular circumstances of any given case.

24. In relation to the availability of “paid no safe job leave” under Item 21 of the draft NES provisions, the ARA recommends this issue not be finalised at this time.
25. Paid parental leave is currently the subject of an inquiry before the Productivity Commission and it is appropriate to postpone any decisions on this matter relating to proposed NES provisions until the Commission’s findings are made known.

26. With the exception of the independent submissions made by the ARA above in relation to this matter, it is otherwise in general support of the positions advanced by ACCI.

Recommendations

- a) Additional concurrent leave beyond the current one week standard should be able to be refused by employers subject to any refusal being based strictly on reasonable business grounds
- b) Examples of reasonable business grounds should not form part of the proposed NES. These issues should be considered based on the particular circumstances of any given case.
- c) Any paid entitlement to parental leave including “paid no safe job leave” should not be finalised before findings of the Productivity Commission on the issue of paid leave are made known.

4. ANNUAL LEAVE

Additional leave

27. The ARA submits that the apparent reliance in the Discussion Paper on modern awards to define a 'shift worker' for entitlements to additional leave is of concern¹⁰.
28. Whilst it is appropriate for modern awards to be able to provide this definition based on industry variables, there should be a definition in the proposed NES for award-free employees so that both employers and employees not bound by modern awards have clarity in relation to this entitlement.

Question 15 (page 28)

Is it appropriate for the definition of shift worker to be contained in modern awards or should the proposed annual leave NES define 'shift worker'?

- The ARA submits that it is appropriate for additional annual leave to be addressed in modern awards given the variables associated with the needs of specific industries. However, it would also be appropriate to consider this forming part of the NES but only in respect of traditionally award-free employees.

¹⁰ ARA (2008) Submission to the AFPC, Para 162, p.28

Payment for annual leave

Questions 22 & 23 (page 29)

What specific issues might arise for particular types of employees from the base rate of pay definition in the proposed annual leave NES?

What types of additional rules, if any, might be appropriate for inclusion in the proposed annual leave NES to address those issues?

- The ARA would not oppose the proposed base rate of pay definition under the NES. However, the reference under Paragraph 166 of the Discussion Paper to remuneration components not included in this definition should be confined only to the standard 17.5% annual leave loading provided for in modern awards.
- An exception to this may be where a higher shift allowance has traditionally been payable in lieu of annual leave loading for certain industries – again a matter that should be addressed solely through modern awards.

General issues

Question 24 (page 30)

Are there any other matters that need to be taken into consideration when finalising the proposed annual leave NES?

- The NES must allow for employer right to direct employees to take annual leave. Ideally, the appropriate period of notice for this purpose would be that currently available under the Standard – “notice appropriate to the circumstances”.
- There is inconsistency between the notice periods prescribed by current awards which commonly range from between 1 to 4 weeks or more. Notice periods under current awards further vary depending on whether leave is being taken for close-down purposes or otherwise.

29. With the exception of the independent submissions made by the ARA above in relation to this matter, it is otherwise in general support of the positions advanced by ACCI.

Recommendations

- a) A definition of 'shift worker' be included in the NES for the purpose of additional annual leave. However, this definition be confined only to award-free employees and not those covered by modern awards.
- b) Base rate of pay definition should only be built upon in modern awards to include annual leave loading or relevant shift allowance where appropriate based on particular industries.
- c) NES must allow for employers to give employees notice to take leave and should be notice appropriate to the circumstances. This would be consistent with the current standard and current awards take too varied approach on the issue.

5. PERSONAL CARER'S LEAVE AND COMPASSIONATE LEAVE

Notice and evidence

Questions 25 & 26 (page 36)

In what circumstances might the rules relating to notice and evidence be inadequate or too onerous for employers and employees?

What, if any, additional rules could be included in the NES in order to address the issues arising in those circumstances?

- Item 41(2)(a) should be amended to state '*... (which may be before or after the leave starts)...*' – this is consistent with the Standard and would otherwise invite late notification of absences by employees if the proposed provision in the exposure draft is retained.

- Paragraphs 189 and 190 of Discussion Paper (Item 41(3)) concerning as no defined limits stipulated re when evidence can be required.

Interaction with other kinds of leave

30. Paragraph 196 of Discussion Paper concerning as suggestion made appears to allow for automatic re-crediting of annual leave where employee falls sick during such leave.
31. With the exception of the independent submissions made by the ARA above in relation to this matter, it is otherwise in general support of the positions advanced by ACCI.

Recommendations

- a) Personal leave notification obligation for employees should reflect ‘... *(which may be before or after the leave starts)*...’ consistent with the current standard to avoid being construed to invite late notification of absences
- b) Some additional clarity should be afforded as to when employees are required to afford evidence substantiating absences from work
- c) The re-crediting of annual leave during personal/carer’s leave absences should only be permitted by agreement with the employer or not permitted at all.